REPLY OF THE UNITED STATES DELEGATION ON ARTICLE 98 AGREEMENTS AND THE INTERNATIONAL CRIMINAL COURT

Statement of Dr. Ruth Wedgwood
U.S. Delegation to the OSCE Implementation Meeting
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Mr. Moderator,

The United States would like to exercise its right of reply to address several statements made by the Coalition for the International Criminal Court on the subject of so-called "Article 98 agreements" reached by the United States with friends and allies.

These agreements concern the legal status of American service members, and other Americans who are serving abroad on long-term deployment or shorter-term visits.

The United States has over 200,000 troops deployed abroad, seeking to protect international security in regions of the globe including Northeast Asia, the Middle East, and Europe. We are unique in this long-term and far-flung commitment to international security.

The United States has justifiable concerns about the potential operations of the International Criminal Court, created by a treaty that we have not ratified.

We remain committed to rigorous application of the law of armed conflict in our service training, doctrine, and military justice system. We send lawyers into the field with our troops, to assure real-time advice on the ethical and legal norms of the battlefield. We evaluate targets to minimize collateral damage. We train our troops with rules of engagement that are designed to mitigate the destructive effects of any war on innocent persons.

Nonetheless, the United States has rational reasons for avoiding the inappropriate use of the jurisdiction of the International Criminal Court.

First, with changing technology and new kinds of war, there are a number of areas where views may differ on how to apply the norms of the battlefield in order to save innocent lives. The Kosovo conflict shows some of the challenges. In 1999, Slobodan Milosevic began his fourth regional war, using the violence of paramilitaries and special police to kill and exile the Muslim citizens of Kosovo. As a last resort, NATO mounted an air campaign to stem these Serb operations. Various "dual use" objects were on the NATO target lists – including selected oil refineries and electrical grids. These facilities sustained Serb military operations, yet their destruction also could burden the civilian community. Whether to disable such "dual-use" objects can be discussed among allies, debated by military planners, and reviewed by a broader public. But there is no settled rule of operational law that excludes such targets. In a similar future conflict, an ambition to use the International Criminal Court to "progressively develop" the law of armed conflict -- without the consent of sovereign states -- may unfairly punish individuals and hobble American military operations.

In addition, international law concerning *when* military means may be used is also unsettled at its limits. This includes questions about the law of self-defense, the enforcement of standing Security Council mandates, and the prevention of humanitarian disaster. The Rome Treaty's ambition to define and charge counts of "aggression" is also potentially hazardous in light of this area of changing law.

So-called "complementarity" is not a sufficient safeguard against misuse of the Rome Treaty. To be sure, the Rome Treaty asks that the International Criminal Court first look to the national courts for remedy. Nonetheless, the rule of complementarity will not provide adequate protection, especially in disputed areas of law. The confidentiality of investigative files is one consideration, and the United States has not agreed as a treaty party to waive that right of confidentiality. In addition, the United States will not be either "willing" or "able" to prosecute service personnel for military operations that are, in its opinion, fully lawful. To do so would be a violation of due process and a betrayal of the trust enjoyed by our service members.

The Article 98 agreements simply respect a traditional division of responsibility. For decades, NATO forces and United Nations forces deployed overseas have been subject to a clear division of responsibility for military discipline. It is the "sending state" – under NATO and UN status of

forces agreements – that retains the responsibility for prosecution and punishment of any misconduct by its armed forces in the course of military deployments, and not the "receiving state." The so-called "Article 98" agreements with our allies under the Rome Treaty thus are fully consistent with this traditional division of labor and responsibility.

It is thus inappropriate for any observer to use overheated rhetoric about the Article 98 agreements. The claimed "integrity of the Rome Statute" does not require disregarding the right of a sovereign state to enter into an agreement to clarify and protect the status of its own nationals. The purpose of the Rome Treaty, by the admission of its own authors, was to found criminal jurisdiction upon the solid basis of state consent, rather than ukase. The Article 98 agreements are consistent with the importance of consent by sovereign states.